Ahrens Aircraft, Inc. *and* Asociacion Internacional de Maquinistas y Trabajadores Aerospaciales, AFL-CIO. Case 24-CA-4322

December 29, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 19, 1981, Administrative Law Judge Arline Pacht issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt her recommended Order,[4] as modified herein.

The Administrative Law Judge found, in the remedy section of her Decision, that Respondent should be ordered to offer discriminatees Mercado and Rivera reinstatement to the jobs of which they were unlawfully deprived or, if such jobs no longer exist, to substantially equivalent jobs, when Respondent resumes operations, and that Respondent should be ordered to make them whole for any losses they may have suffered from the date of their discharges, May 21, 1980, to such date as Respondent demonstrates during the compliance stage of this proceeding that they might have been laid off in the normal course of business.[5] She further specified, in her recommended Order, that Respondent be required to offer Mercado and Rivera reinstatement as soon as Respondent resumes its aircraft assembly operations or has appropriate jobs, whichever comes first. The recommended remedy and Order would thus appear to assume that Mercado and Rivera would have been laid off at some point prior to the hearing date. We note, however, that at the beginning of the hearing counsel for Respondent stated in arguing in support of a motion to dismiss that the issues are moot because Respondent had been forced to lay off over 80 percent of its employee work force, and that the plant had been temporarily shut down since late May 1980. Counsel stated at that time that there were "some 35 or 36 employees, which is just really a skeleton crew, at the plant to keep the plant somewhat functional for their tax exemption purposes and to receive mail." Because it is not clear whether or not Mercado and Rivera would have been retained by Respondent as part of this skeleton crew but for Respondent's discrimination against them, we shall clarify the Administrative Law Judge's recommended Order by deleting its reference to offering Mercado and Rivera reinstatement when Respondent resumes operations or has appropriate jobs, so as not to preclude a finding at the compliance stage of this proceeding that they would not have been laid off absent the discrimination practiced against them. We shall also order expunction of any reference in Respondent's files to Mercado's and Rivera's discharges.

[1] Respondent's motion that the Board remand this case for rehearing so that Respondent may present the testimony of Peter Ahrens, president of Ahrens Aircraft, who was unavailable for the hearing because he was out of Puerto Rico and in Washington, D.C., on business, is hereby denied. Although Respondent contends that Peter Ahrens' testimony as to supervisory issues and the appropriateness of the bargaining unit is indispensable to its case, Respondent did present several witnesses who were intimately familiar with Respondent's operations and who testified relative to these matters. These witnesses included Respondent's vice president in charge of purchasing, production, and personnel, Edd Ahrens, as well as its production manager, Carlos Ruiz. Further, when afforded an opportunity by the Administrative Law Judge to make an offer of proof with regard to any testimony which counsel for Respondent might wish to elicit from witnesses who could not be present, Respondent declined to do so. In any event, the matters which Respondent urges would be established through the testimony of Peter Ahrens—specifically, on the supervisory issue, that a high ratio of supervisors is required in the aviation industry, and, on the unit issue, that the production of aircraft mandates a wide variety of diverse skills, training, and personnel—would not alter our conclusions herein.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[3] The Administrative Law Judge's Decision contains several apparently inadvertent errors which do not, however, affect the results herein. First, the Administrative Law Judge lists in fn. 5 of her Decision the individuals Respondent contends are supervisors, stating that there are 20 such persons whose status is in dispute. Only 19 names are listed therein, the 20th individual alleged by Respondent to be a supervisor, Juan Martir, having been agreed by both Respondent and the General Counsel to be a supervisor within the meaning of the Act. References in other portions of the Decision adverting to the 20 individuals whose status is in dispute are likewise in error. Second, the Administrative Law Judge refers in fn. 9 to Jt. Exh. 1(b) when it is apparent from the record that she in fact means Jt. Exh. 2. Finally, in the third paragraph of that section of the Decision entitled "Events in January 1980," the statement that several employees visited the ADT offices to complain that they had not received the contractually promised wage increase of $3.50 an hour should in fact state the contractually promised wage increase *to* $3.50 an hour.

[4] Member Fanning would make the bargaining order prospective in nature. See his separate opinion in *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977).

Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[5] The Administrative Law Judge apparently inadvertently failed to cite *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for the rationale on interest payments.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Ahrens Aircraft, Inc., Aguadilla, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Eduardo Mercado and Frederick Rivera immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the section of this Decision entitled 'The Remedy.'"

2. Insert the following as paragraph 2(b):

"(b) Expunge from its files any reference to the discharges of Eduardo Mercado and Frederick Rivera on May 21, 1980, and notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against them."

3. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order."

4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give employees these assurances:

WE WILL NOT discharge, terminate, lay off, or refuse or fail to reinstate, recall, or rehire employees for engaging in union activity or for exercising any right under the Act.

WE WILL NOT threaten employees with discharge, plant closure, or any other reprisals for engaging in union or other protected concerted activity.

WE WILL NOT create the impression that we are keeping employees' union activities under surveillance.

WE WILL NOT instruct employees they are ineligible to join a union.

WE WILL NOT question employees concerning their interest in or sympathies for the Union.

WE WILL NOT reprimand or otherwise discipline employees for engaging in union activities or any activity protected under the Act.

WE WILL NOT maintain in effect the rule in the Employee Handbook which prohibits the distribution of unauthorized material on company property during nonworking hours.

WE WILL NOT otherwise violate the Act directly or indirectly in order to destroy or dissipate the collective-bargaining status of the lawfully designated union representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of any of the rights set forth at the top of this notice.

WE WILL offer Eduardo Mercado and Frederick Rivera immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, and WE WILL make each of them whole, with interest, for all moneys lost as a result of their dismissal from work on May 21, 1980.

WE WILL expunge from our files any references to the discharges of Eduardo Mercado and Frederick Rivera on May 21, 1980, and WE WILL notify them both that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against them.

WE WILL immediately recognize and, upon request, bargain with Asociacion Internacional de Maquinistas y Trabajadores Aerospaciales,

AFL-CIO, as the exclusive representative of all the employees in the unit described below with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, WE WILL put such understanding into a written contract which we will sign. The appropriate unit is:

> All production and maintenance employees of Ahrens Aircraft, Inc., employed at its plant, exclusive of all other employees, office clerical employees, guards and supervisors as defined in Section 2(11) of the National Labor Relations Act, as amended.

AHRENS AIRCRAFT, INC.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge: This case was heard in Mayaguez, Puerto Rico, on October 14–16, 1980, pursuant to a charge filed on May 23, 1980, by Asociacion Internacional de Maguinistas y Trabajadores Aerospaciales, AFL-CIO, and a complaint which issued on August 8, and was amended on August 18, 1980. A timely answer was filed on August 20, 1980. The questions presented are whether (a) Respondent, Ahrens Aircraft, Inc., violated Section 8(a)(1) of the National Labor Relations Act, as amended, by (1) threatening its employees with plant closure if they supported a union or engaged in concerted activities, (2) maintaining and enforcing an overly broad no-distribution rule, (3) threatening employees with discharge if they joined the Union, (4) improperly interrogating them about their concerted activities, and (5) creating the impression of surveillance; (b) violated Section 8(a)(3) and (1) by discharging Freddy Rivera and Eduardo Mercado; (c) Rivera and Mercado and 18 other employees were supervisors within the meaning of Section 2(11) of the Act, (d) whether the unit defined in the complaint is appropriate, and (e) in the circumstances of this case, a bargaining order is appropriate.

Upon the record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel and for Respondent, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, maintains an office and place of business (hereafter called the plant) in Aguadilla, Puerto Rico, where it is engaged in the design, manufacture, and sale of a prototype aircraft. During the 12 months preceding the issuance of the complaint, a representative period, Respondent purchased and received at its plant goods and materials valued in excess of $50,000 which were transported directly from points outside Puerto Rico.

I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.[1]

II. SUPERVISORY ISSUES

A. *The Evidence*

1. Plant structure

The parties stipulated that as of May 23, 1980, 118 employees comprised the Ahrens Aircraft work force, and that, of this number, 113 signed authorization cards, including 20 persons who Respondent contends and the General Counsel denies were supervisors within the meaning of Section 2(11) of the Act.

Respondent's organizational structure was multitiered, with members of the Ahrens family occupying the most senior positions. Peter Ahrens serves as the Company's president; his wife Magda Juame is comptroller; one son, Edd Ahrens, is vice president in charge of production, purchasing, and personnel; a second son, Kim Ahrens, is vice president of engineering. At the next lower rung of responsibility, with daily and immediate oversight over employees in three operating divisions, as of May 1980, was Carlos Ruiz who reported to Edd Ahrens. Jose Morales, project engineer, who reported to Kim Ahrens, occupied a similar position of authority with respect to the two other divisions. Each major division was headed by a senior supervisor. Three of these divisions, those under John Rodriguez, Anthony Acosta,[2] and Carlos Rivera, were divided into some five or six shops.[3] Each such shop was under the direction of a "junior supervisor," as Respondent referred to them, and several of the shops were subdivided into sections.[4] It is the status of the employees heading each of the shops and shop sections which is in dispute here.[5]

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[1] Respondent neither admitted nor denied that the Union is a labor organization within the meaning of the Act. Accordingly, pursuant to F.R.C.P. 8(b) and (d), the allegation will be deemed admitted.

[2] In April 1980, Rodriguez and Acosta became assistant plant managers to Ruiz. However, the record does not suggest that their duties changed with respect to the management of the shops within their divisions. At the same time that Rodriguez and Acosta received new titles, they and other division chiefs became salaried employees.

[3] The other two major divisions, drafting and quality control, had only eight employees each and, therefore, functioned as single units.

[4] The wing shop, under the direction of Senior Supervisor Robert McQue, had two sections: Wing I which was headed by Freddy Rivera and wing II by George Montalvo. Similarly, the fuselage shop was directed by Jose Christy with two sections led by Hiram Enchautegui and Juan Mendez.

[5] The 20 men who Respondent contends were supervisors, the shop to which each was assigned, and the number of employees working with them are as follows: Ariel Berrios—horizontal tail (2); Jose Christy—fuselage; Hiram Enchautegui—fuselage I (5); Juan Mendez—fuselage II (5); Adalberto Cuadrado— (2); Manuel Lopez—fluid systems (none); Melvin Martinez—engine instruments (2); Eduardo Mercado—experimental (1); Abraham Mora—sponson (2); Nicholas Ramirez—flight deck (2); George Montalvo—wing II (3); Freddy Rivera—wing I (5); Luis Rivera—control surfaces (8); Wilfredo Ramos—parts shop I (9); Neftali Rodriguez—parts shop II (7); Julio Lopez—parts shop III (7); Juan Salas—tailgate doors (5); Alfredo Sosa—drafting (7); Jose Valentin—hydraulics (6).

2. Responsibilities of junior supervisors

The record establishes that the authority to hire, fire, suspend, or impose other discipline on employees was vested in Edd Ahrens. He, with Ruiz, assigned employees to particular shops based on the work to be done, and determined when to transfer particular employees from one group to another. They also mapped out work assignments for each shop. Ruiz then transmitted the assignments to the shop supervisors on a daily basis. Thereafter, the junior supervisor distributed those assignments to each member of his crew taking into account the experience of the various employees. A record of jobs performed was maintained by each worker. At the end of the week, the shop and section leaders initialed the forms and submitted them to Ruiz.

Although the shop supervisors were responsible for instructing, guiding, and correcting their coworkers, they spent the greater portion of the day performing their own manual assignments side by side with their coworkers. Shop and section supervisors were paid at an hourly rate ranging from 50 cents to $1 to $2 more per hour than other members of the shop. They punched a timeclock and worked the same number of hours as other production employees. They had no responsibility for assigning or approving overtime; rather, at Ruiz' request, they themselves worked overtime at the standard double pay. Requests for excused absences also had to be approved by Ruiz. Although Edd Ahrens testified that the junior supervisors were empowered to reprimand other employees orally or in writing, there was no evidence that such power, if it existed, ever was exercised.[6] Ahrens also testified that the shop supervisors were authorized to recommend employee transfers. However, Abraham Mora, an alleged supervisor, testified that, when he requested two specific employees to be assigned to his shop, Ruiz assigned two others.

On a semiannual basis, the junior supervisors evaluated the employees in their groups using forms provided by the Company. Each form listed a number of areas such as attendance or cooperation for which the evaluator was to assign a number from 1 (unacceptable) to 5 (excellent). The evaluations then were submitted to Ruiz who reviewed them and added his own narrative comments as to the employee's abilities. Ruiz submitted the evaluations to Edd Ahrens who determined whether and how much of a pay raise within a 4- to 6-percent range the employee should receive.

At irregular intervals, generally every 1 or 2 months, junior and senior supervisors attended staff meetings called and conducted by Ruiz. The principal topics of discussion related to the production of the aircraft, but occasionally other matters such as attendance, tardiness, or observance of safety standards were raised.

3. Work histories of Mercado and Rivera

An examination of the work histories of Eduardo Mercado and Freddy Rivera provides added insight into the role and status of the junior supervisor in Respondent's plant.

Mercado (with 10 years) and Rivera (with 7 years' prior experience in aircraft assembly) were first employed by Respondent in 1978 and sent to the Northrop Institute of Technology for technical training. Shortly after returning to the Ahrens plant, Mercado was assigned to the tail cone boom section with four employees under his charge and then to the fuselage shop. In October 1979, he was transferred to the experimental shop where, as the sole employee, he reported directly to Ruiz and Kim Ahrens. After 4 months, he requested assistance with the manual installation of the heavy landing gear doors on which he was working. Three employees were selected by Ruiz to work with Mercado but, in the latter part of April or early May, Ruiz transferred two of the three assistants back to their original shops.

Rivera's entire career with Respondent was as a junior supervisor in the wing shop. Initially, when there was only one wing under construction, he served as Senior Supervisor Robert McQue's sole assistant. However, in April 1980, when the assembly of a second wing commenced, the shop was divided into two sections. Rivera remained a leader of wing I with five employees and George Montalvo took charge of wing II with three other employees. Rivera explained that Ruiz handed out work assignments to McQue who, in turn, relayed them to Rivera and Montalvo for distribution to their crews. Rivera estimated that 70 to 75 percent of his workday was spent performing his own assignments in contrast to McQue who was engaged in manual tasks about 30 percent of the time. The balance of McQue's workday, according to Rivera, was devoted to planning and coordinating work, reviewing or preparing written requests for changes in the blueprint designs for various parts of the aircraft, or checking on supplies.

Both Mercado and Rivera testified that they evaluated the employees in their shops in March 1980. However, Ruiz disregarded Rivera's evaluations believing he was not sufficiently objective in assessing his coworkers' abilities. Instead, McQue prepared the evaluations of the employees in the entire wing shop including one for Rivera. Mercado's evaluations apparently were afforded no greater weight than Rivera's for only one of the three evaluation forms completed by him turned up in Respondent's files.

In contrast to Edd Ahrens' assertions, neither Mercado nor Rivera believed they had any authority to reprimand or discipline other employees. Indeed, Mercado related that on one occasion, when he attempted to correct the work methods of a man in his shop, the employee ignored Mercado and obtained a transfer to another shop from Ruiz.

B. *Conclusions*

The burden of proving the supervisory status of employees rests on Respondent as the party asserting that status. *Tucson Gas & Electric Company*, 241 NLRB 181 (1979). After carefully reviewing the relevant evidence and considering the principal factors on which Respondent relies in support of its position that the shop supervisors are supervisors under the Act, I find that burden has not been met.

[6] The only documentation of reprimands adduced by Respondent were several memos which Ruiz wrote concerning Mercado.

Respondent points out that the shop supervisors were responsible for assigning work to members of their respective groups. However, it is undisputed that the assignments which were planned by Edd Ahrens and Ruiz issued initially from Ruiz and were merely redistributed by junior supervisors to their fellow workers according to their level of experience. Thus, the degree of judgment exercised by the shop leaders in allocating jobs was very much limited by the direct involvement of their superiors. Put in proper perspective, the shop supervisor served as a conduit for management's instructions. The assignment of work was, therefore, routine in nature and did not depend on the exercise of independent discretion, which is a hallmark of the supervisor. See *B-P Custom Building Products, Inc.*, 241 NLRB 1118 (1980); *Cablevision Systems Development Co., a partnership*, 251 NLRB 1319 (1980); *Wirtz Manufacturing Company, Inc.*, 215 NLRB 252, 254 (1974).

Respondent further asserts that the shop supervisors exercised independent responsibility in directing the work of the shop employees. As the most experienced employees in each group, the shop leaders did train and guide their fellow workers in the performance of their jobs. However, they did not display any greater degree of authority than any senior, knowledgeable employee would in relation to less experienced juniors. See *High Performance Tube, Inc.*, 251 NLRB 554 (1980); *Hitchiner Manufacturing Company*, 243 NLRB 927 (1979); *Dependable Lists, Inc.*, 239 NLRB 1304, 1308 (1979); *Tom's Ford, Incorporated*, 233 NLRB 28 (1977). With two and even three senior supervisors above them who were engaged in direct daily review of the work in each shop, group leaders had little opportunity to exercise genuinely independent judgment. Although the shop leaders had the authority to correct the work of their fellow employees, there is no evidence that they could reprimand or otherwise discipline employees to an extent which might significantly affect the employee's job status or work to his detriment. Thus, the group leader exercised little meaningful control over his coworkers' performances. *Tucson Gas & Electric Company, supra.*

Respondent also suggests that because the shop supervisors performed evaluations of their fellow employees they were in a position to make effective recommendations leading to the reward of such employees. However, each evaluation was subject to Ruiz' scrutiny and he was at liberty to agree or disagree with the evaluator. In more than a dozen instances, Ruiz reduced the numerical score given by the shop supervisor and on most of the forms entered narrative comments which revealed a personal knowledge of that employee's work habits. What weight, if any, would be given to the initial evaluation was completely within Edd Ahrens' discretion. Since the evaluations were twice removed from the eventual bestowal of any benefit, and since the evaluation could be rejected by Respondent without explanation, as they were in Rivera's case, they cannot be regarded as having any decisive effect.[7] See *Hydro Conduit Corporation*, 254 NLRB 433 (1981).

[7] Respondent also was unable to produce any evaluations from alleged Shop Supervisor Cuadrado.

Respondent submits that the attendance of shop supervisors at management meetings also indicates their supervisory status. Although under certain circumstances such attendance has identified an employee as a company representative, I am aware of no case in which such attendance, in the absence of other criteria, is sufficient to cloak an individual with supervisory status. It should also be noted that attendance at management meetings is not among the supervisory functions identified in Section 2(11).

Moreover, in no other area did the men who were alleged to be supervisors possess any characteristics of supervisory authority within the meaning of the Act. It is undisputed that they could not hire, fire, suspend, promote, transfer, reward, discipline, assign overtime, grant time off, or resolve the grievances of other employees. Nor does the evidence establish that they could effectively recommend such actions. Accordingly, I find that 19 of the 20 alleged supervisors were, in fact, nonsupervisory group leaders.[8]

The conclusions reached with respect to shop supervisors as a class apply with particular force to Freddy Rivera and Eduardo Mercado. Each was a seasoned employee, but expertise is not an exclusive property of a supervisor. Nor is it critical that they were called junior supervisors by management and group leaders by others; what is relevant is the actual authority they possessed, and not the conclusionary assertions of Respondent.

In this regard, it is significant that Rivera was at the lowest level in the chain of command, subordinate to McQue, Acosta, Ruiz, and Ahrens. Given the extent to which he was subjected to supervision, little room was left for Rivera to exercise independent judgment.

Mercado had only one employee working with him during the last month of his employment, and that was because it was physically difficult for him to perform the job alone. For a significant period of time he supervised no one. The Board frequently has suggested that a low ratio between the supervised and the supervisor, as was the case here, diminishes the degree of authority exercised by the person in charge.[9] See, e.g., *Wirtz Manufacturing Co., supra* at 253–254; *Spector Freight System, Inc.*, 216 NLRB 551, 554 (1975).

Both men testified without controversion that they spent the greatest portion of their workday in manual labor, worked the same number of hours, punched a timeclock, received hourly pay, and received no pay when absent due to illness, in precisely the same manner as any other employee. That their hourly rate of pay was higher than those of many other employees merely re-

[8] The record established that, like Robert McQue, Jose Christy had two assistants working under him. Further, he made several recommendations for promotion and evaluated persons alleged to be supervisors. However, the record was barren of any evidence that other functions Christy performed may have distinguished him from or aligned him with the other shop supervisors. Accordingly, I draw no conclusions as to Christy's nonemployee status. However, as discussed, *infra*, whether or not he is included in the unit does not affect the Union's majority status.

[9] Respondent included Alfred Sosa and Manuel Lopez among the group of 20 alleged supervisors. However, Jt. Exh. 1(b) shows that neither had any subordinate and, therefore, cannot be deemed supervisors under the Act. Respondent may not, by the mere imposition of a title, convert workers into supervisors.

flects their greater experience and seniority with Respondent. Although they had some responsibility for instructing and correcting employees in their group, their guidance appeared to be offered in an informal and cooperative spirit for they were without power to put any bite into a command. It was apparent that Mercado and Rivera identified completely with the employees' interests. They did not regard themselves nor were they viewed by others as an arm of management, particularly when they were selected by their coworkers to represent them in forwarding their grievances to Respondent. See *High Performance Tube, Inc.*, 251 NLRB 1362 (1980).

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Events in January 1980*

Respondent commenced its operations in Puerto Rico in 1976, attracted by the Commonwealth's offer of tax incentives and grants to underwrite training for both skilled and unskilled labor.

According to contracts executed between Respondent and the Administracion de Derecho al Trabajo (Workers Rights Administration, hereinafter referred to as ADT), 14-week sheet metal training programs were given at the Aguadilla plant to groups of unskilled employees who were referred to Respondent by ADT. Trainees were promised $2.90 during the training period, $3.26 upon its completion, and $3.50 an hour when the ADT contract expired in December 1979.

In January 1980, several of the ADT employees visited the ADT offices to complain that they had not received the contractually promised wage increase of $3.50 an hour.[10] An official there advised them that ADT had no way of compelling Respondent to abide by the terms of the then-expired contract. Subsequently, Edd Ahrens met with a delegation representing the discontented employees and informed them that the terms of the contract with ADT had been revised and that no raise would be forthcoming until after the next biannual evaluation was completed. During the course of the meeting, he mentioned that the Company was cooperating with Puerto Rico, and that the only reason it would leave was if a union were brought in. He also suggested that the Company could sell the blueprints for the aircraft to another company thereby leaving everyone without jobs.[11]

B. *Events in May 1980*

Early in May 1980, in response to the wishes of employees in the wing and quality control shops, Freddy Rivera drafted a petition requesting that management issue paychecks on a weekly rather than bimonthly basis. On the morning of May 12, Rivera gave the petition to George Montalvo who then circulated it among all the workers. By early afternoon, over 100 employees had signed the petition. It was turned over to Eduardo Mercado for presentation to management during a staff meeting scheduled later that day.

At the staff meeting that afternoon, after certain production problems were discussed, Ruiz invited questions from the participants. Mercado took the opportunity to mention the petition and asked Ruiz for his opinion as to whether the employees could be paid weekly. Ruiz reacted with some irritation, stating that he hoped the petition had not been signed on company time since this would be against company rules. The rule to which Ruiz was referring, as set forth in the employee handbook, made it an offense subject first to a warning and then to discharge to distribute "written or printed material to employees (irregardless [sic] of nature) without prior company approval or authorization."

Mercado assured Ruiz that the petition had been signed during the lunch period and on breaks. Then, Kim Ahrens, who also was present at the meeting, commented that it would be too costly for the Company to convert to a weekly pay system and suggested that the problem lay in the employees' failure to better budget their wages. Viewing these statements as a denial of the employees' request, Mercado felt it would be futile to present the written petition and, instead, returned it to another employee.

On Friday morning of the same week, the petition turned up on Ruiz' desk who then submitted it to Edd Ahrens. This prompted Ahrens to call another supervisory meeting at which time he upbraided those who had signed the petition. Ahrens took the position that the junior supervisors owed their loyalties to management and had erred in failing to dissuade the employees from signing petitions. He further contended that some of the signatures had been obtained by coercion and intimidation and that the circulation of the petition was in violation of company rules. After Ahrens left the meeting, a number of those present questioned their status as supervisors. Others made reference to a Puerto Rican law which required weekly pay as well as sick pay.[12] Freddy Rivera suggested that the minimum wage and National Labor Relations Board laws should be posted on the company bulletin board.

Following Respondent's apparent rejection of the petition, the employees gathered at a community gym after work on May 16, and elected a committee which was charged with preparing a list of grievances for presentation to management.[13]

The following day, a Saturday, the committee members met at Mercado's home and drafted a letter outlining a number of employee complaints.[14]

[10] The previous July, after completing the training program, several employees visited the ADT offices to inquire why they had not received the first wage increase provided in their ADT contracts. It is undisputed that, shortly thereafter, Edd Ahrens called these employees to his office and told them to direct their questions to him, not to ADT. A week later, the 16 affected employees received the requisite pay increases retroactive to the date on which their training concluded.

[11] My findings in this paragraph are based on a composite of the credited testimony of Peter Lugo and Ruben Ferrer whom I found, based on their demeanor, to be trustworthy witnesses. Their descriptions of the surprise they felt when Ahrens unexpectedly mentioned a union could not have been feigned and lends authenticity to their entire account of this meeting. Moreover, having given an uncontradicted account of the first meeting with Ahrens, it is far more likely that Ferrer's version of the second meeting, rather than Ahrens', also was accurate.

[12] The Company did not provide for paid sick leave.

[13] Those elected were Peter Lugo, Eduardo Mercado, Nicolas Ramirez, and Freddy Rivera.

[14] Generally, the complaints related to the matter of weekly pay, additional paid holidays, compensation for sick leave, the relationship be-

Continued

On Monday morning, May 19, Mercado hand-delivered the letter to Ruiz, telling him that the committee expected a response in 24 hours. During the course of the day, Johnny Rodriguez, an assistant plant manager, told Mercado that 24 hours was too short a time for management to respond. He also asked Rivera what would happen if the letter was not answered within 24 hours, to which Rivera replied that the employees would have to decide by majority vote, but that he doubted that a protest could be averted.[15] Later that day, Rodriguez told Mercado that the Company's response to the grievance letter was negative.

In reaction to the receipt of the grievance letter, Edd Ahrens and Ruiz embarked on a series of meetings with the employees in each shop throughout May 20 and 21. In describing the meeting which he attended with other employees in the wing shop, Rivera said that Ahrens discussed the various items in the grievance letter with the assembled group. When Mercado and 15 other employees met with Ahrens and Ruiz, Ahrens stated among other things that the Company might cease to exist if too much was asked of it.[16]

After work on May 20, Mercado arranged for another mass meeting of the employees at which time, Juan Maldanado, the Union's business representative, spoke about the procedures involved in organizing and described the rights which workers have.[17] Mercado then asked for a vote on whether the employees favored joining the Union. By a show of hands, a majority of those attending registered their approval. After the meeting ended, Mercado distributed authorization cards and obtained 37 signed cards immediately.

C. *The Discharges*

The following day, May 21, Mercado arrived at the plant parking lot at 6:30 a.m., one-half hour early, to distribute additional cards to employees before they entered the facility. He was joined shortly thereafter by employees Lugo, Rivera, and Enchautegui who also began to circulate union authorization cards and distribute union literature. As a large number of employees began to collect around them, they became aware that a number of Respondent's chief executives were watching the employees from the vantage point of a small platform outside the door which management used to enter the plant. Ruiz approached Mercado and warned him that he was violating company rules and could be fired for his activities. Mercado replied that he was acting lawfully as a union organizer. Rivera then handed Ruiz a copy of the union literature he had been distributing. Ruiz then warned him that he too could be fired for violating company rules by distributing union propaganda.

Later that morning, Ruiz told Mercado and Rivera they were fired as of noon that day for having violated the Company's rules. He further advised them that they would receive termination notices by mail. Ruiz prepared such notices and subsequently inserted them in each man's personnel file but never sent them to the men. Four of the six reasons cited for Mercado's dismissal had to do with his allegedly argumentative nature and inability to work well with others. In support of these conclusions, Ruiz alluded to several memos in Mercado's personnel folder documenting three arguments he had with employees in March, May, and June 1979. The last two reasons listed in Mercado's termination notice concerned his violating company rules by circulating the May 12 petition on company time and company premises.

In addition to his role in circulating the May 12 petition, three other reasons were outlined in the notice justifying Rivera's discharge, including an inability to work harmoniously with others and an unwillingness to encourage persons in his crew to engage in productive work. By this, Ruiz was referring to an incident in which an employee, Grace Peterson, allegedly accused Rivera of telling her to look busy when she needed a new assignment. In fact, Peterson testified that she told Ruiz it was Supervisor Robert McQue who made the statement which Ruiz attributed to Rivera. At the hearing, both Edd Ahrens and Ruiz testified that the decision to terminate Rivera and Mercado was made on either May 19 or 20 and was based on their belief that the two had originated the petition requesting weekly pay, thereby interfering with production.

D. *Other Alleged Independent Violations*

(a) On a day soon after employee Juan Mendez signed the first petition seeking weekly pay, he was told by Juan Martir that if he or anyone else became involved in union matters they could be fired.

(b) On May 21, in the parking lot prior to beginning work, Mendez handed a signed authorization card to a fellow employee under the scrutiny of the nearby company officials. Later that morning, Antonio Acosta approached Mendez at his work station and warned him that he or anyone else involved in issues such as strikes could be fired.[18]

(c) During the week of May 19, Martir called a special meeting of the quality control employees and advised them that they could not belong to the Union. Some of the employees reacted by laughing and several others suggested that Martir was incorrect. Martir responded by telling the employees he would check with William Black, a Federal Aviation Agency inspector working closely with Respondent.

(d) Later that day, Martir summoned the quality control employees to another meeting in Kim Ahrens' office. With Martir seated beside him, Inspector Black told the group that they should not join the Union for they were

tween management and the workers, the inadequacy of medical services, and sanitary conditions at the plant.

[15] At one of the after-hours meetings of the employees, a vote was taken authorizing a strike. However, the exact date was not made known since there was some apprehension that reports of the workers' activities were being relayed to management.

[16] Respondent did not deny that Ahrens made this statement.

[17] Mercado contacted Maldanado the previous day because he was apprehensive that his prominent role in the employees' concerted activities might lead to management reprisals against him.

[18] For demeanor reasons, I credit Mendez' testimony in preference to Acosta's denial.

considered a part of management and that in his experience such employees were never represented by unions.

(e) Shortly after this meeting concluded, Martir told quality control employee Luis Muniz and Linda Santiago that they could be fired if they became involved with the Union.

(f) The day after these two meetings took place, Martir instructed employee Rey Mendez that quality control workers could not join the Union and would be discharged if they did so.

(g) Prior to the start of the workday on May 25, Peter Lugo was soliciting signatures on a union petition in the parking lot, when he was told he was being watched. At 7:30 a.m., he was summoned to Edd Ahrens' office where Ahrens questioned him about what he had been doing earlier that morning. When Lugo explained that he was soliciting signatures for the Union, Ahrens reprimanded him with a verbal warning for violating company rules. He also asked Lugo why the employees wanted to bring a union into the plant, and why they could not simply discuss their problems with Ruiz.

(h) On October 6, 1980, just 1 week before the instant hearing, Rey Mendez was called to an interview where, with Edd Ahrens present, one of Respondent's attorneys asked him whether Martir had held a meeting with the quality control staff, whether he had in fact threatened them about joining the Union, and whether FAA Inspector Black's remarks were perceived as threats by the employees.

IV. DISCUSSIONS AND CONCLUSIONS

A. *Independent 8(a)(1) Violations*

I find there is substantial and frequently uncontroverted evidence in the record which supports the General Counsel's allegations that Respondent engaged in an extensive series of unfair labor practices. Thus, in agreement with the General Counsel, I find that Respondent's comments in January 1980, to a delegation of employees who were pressing for higher wages, that the Company would abandon Puerto Rico if the plant was unionized and that it would sell its blueprints, leaving the employees jobless, were unequivocal threats of plant closure in violation of Section 8(a)(1). See *DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 828, 839 (1979); *American Spring Wire Corporation*, 237 NLRB 1551, 1553 (1978). This threat was conveyed months before the Ahrens employees actually began to organize. However, Edd Ahrens' similar remark to a group of employees on May 21, that the Company might close if too much pressure was placed on it by employees, came at the height of the Union's drive. An employer's allegation that employees' collective activity will lead to plant closure constitutes an unlawful threat rather than a lawful prediction unless the employer shows that its statement was based on objective facts which demonstrate probable consequences outside its control. *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 617-619 (1969). Here, Ahrens' comment was not an objective response to concrete costs attached to specific employee proposals. Rather, it was a threat clearly designed to discourage the employees from engaging in collective activity and is *per se* violative of Section 8(a)(1). *Chester Valley, Inc.*, 251 NLRB 1435 (1980); *Bacchus Wine Cooperative, Inc., and Bacchus Wine International*, 251 NLRB 1552 (1980).[19]

I also find that Respondent's overly broad rule prohibiting the distribution of any printed material to employees without prior company authorization is illegal on its face.

Respondent attempted to prove that the rule was not unlawfully applied by showing that, at a staff meeting on May 12, Ruiz had limited the invocation of the rule only to the distribution of unauthorized materials on company time and company premises. However, Respondent was unsuccessful in disguising the untempered application of the rule to the distribution of union authorization cards and union literature by Rivera and Mercado on May 21. Although their circulation of union materials took place on the parking lot before working hours, Ruiz announced in the presence of a large number of employees that Rivera and Mercado could be fired for disobeying the Company's rule. Similarly, Respondent held Peter Lugo liable for violating the rule although his activities, too, occurred prior to the start of the workday. Accordingly, both in its promulgation of and adherence to the overly broad rule, Respondent has violated Section 8(a)(1). *W. B. Johnson Properties, Inc., d/b/a Olympic Villas*, 241 NLRB 358 (1979); *Essex International, Inc.*, 211 NLRB 749 (1974).

Ruiz' threats to discharge Mercado and Rivera on May 21 were particularly pernicious since they were communicated in the presence of a large group of employees, and were made with the apparent endorsement of many of the Company's top management officials who were surveying the scene. Ruiz' testimony at the hearing in this case suggests that he knew the no-distribution rule should not have been applied to situations in which employees were circulating material during nonworking hours. Thus, his reliance on that rule to outlaw Mercado and Rivera's activities was merely a ruse to disguise a blatant effort to intimidate them and all the other employees present and to dissuade them from exercising their protected right to engage in collective activity.

Evidence that Juan Martir, manager of the quality control division, threatened employees with discharge and attempted to inhibit their union activity was abundant and uncontradicted. Respondent suggests, however, that Martir should be held blameless because of his honest conviction that quality control employees were not eligible for union membership. It is well settled that subjective motivation, even if innocent, is irrelevant to finding a respondent liable for the commission of unfair labor practices. That the employees laughed when Martir told them they could not join the Union is equally irrelevant for employees' subjective reactions to an alleged illegality may not be taken into account. (*El Rancho Market*, 235 NLRB 468, 471 (1978)). Thus, Martir's re-

[19] Although Ahrens' statement was not alleged as an unfair labor practice in the complaint, it was part and parcel of Respondent's antiunion campaign and was a matter about which Respondent had ample opportunity to offer evidence. Accordingly, I find Respondent's threat to be another instance of unlawful conduct in violation of Sec. 8(a)(1). *Justak Brothers and Company, Inc.*, 253 NLRB 1054 (1980); *Ultra-Sonic De-Burring, Inc. of Texas*, 233 NLRB 1060, 1068, fn. 12 (1977).

marks to Rey Mendez, Juan Mendez, Luis Nunez, and Linda Santiago are blatant threats of reprisal against employees who may attempt to exercise their Section 7 rights. Moreover, in a plant the size of Respondent's where the work force is homogeneous, such statements were certain to receive widespread circulation. Martir's representations to all quality control employees that they could not join the Union are attributable to Respondent which acknowledged in its answer that he was a "part of the management team." As such, they constitute independent violations of Section 8(a)(1). Similarly, Respondent also is accountable for the remarks of third parties such as William Black when he in Martir's presence and with his apparent endorsement advised the employees they should not join the Union.

Based on my observations of the witnesses' demeanor, I further credit Juan Mendez' testimony that Supervisor Antonio Acosta warned him that employees who were involved with the Union would be fired, and I find this statement to be a threat also proscribed by Section 8(a)(1).

Peter Lugo's uncontradicted account of his May 25 interview with Edd Ahrens gives rise to additional findings of unlawful conduct. Less than an hour elapsed between the time that Lugo was engaged in union activities and the time he was paged to Ahrens' office thereby suggesting that his conduct was under observation. Creating the impression of surveillance is forbidden under the Act for it may tend to inhibit the employee's future union activities. *Ravenswood Electronics Corp.*, 232 NLRB 609, 614–615 (1977). Under the guise of determining whether Lugo was engaged in sabotage or espionage, Respondent then proceeded to question him about his activities earlier that morning and about his reasons for wanting to bring a union into the plant. Although Lugo explained that he was collecting signatures for a union petition and although Ahrens knew that this had occurred prior to the start of the workday, he nevertheless issued a verbal warning. In these circumstances, the interrogation and the issuance of the warning were unlawful intrusions into Lugo's right to engage in union activity. That the interview had the inhibiting effect which Ahrens' intended is made clear from Lugo's assurance that he would refrain from such conduct in the future.

Respondent engaged in another episode of unlawful interrogation when it questioned employee Rey Mendez about the meetings which Martir and Black held with the quality control employees. By failing to assure Mendez that he was not compelled to participate in the interview and that he would suffer no reprisals, Respondent thereby ignored the standards for permissible interrogation required by *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964), enforcement denied 344 F.2d 617 (8th Cir. 1965).

B. *Unlawful Discharges*

Having found that Mercado and Rivera were employees entitled to the protections of the Act, a question still remains as to whether they were terminated on May 21 because of their involvement in concerted activities. A review of the circumstances surrounding these discharges leaves not a shred of doubt that they were fired for reasons which are violative of Section 8(a)(1) and (3).

Respondent clearly had knowledge that Mercado and Rivera were profoundly involved in the employees' concerted activities and played an instrumental role in the Union's organizational campaign. Neither man took pains to conceal his activities. To the contrary, Rivera's signature headed the list of names on the first employee petition of May 12. Mercado forthrightly presented the employees' position concerning weekly pay at the May 12 supervisory meeting and just as forthrightly delivered the second petition to Ruiz on May 19. There was nothing covert about Mercado's role in organizing a meeting of employees after work at which the union business agent spoke, nor did Mercado or Rivera conceal their efforts to solicit union authorization cards on the company parking lot just before the start of the workday. Thus, Respondent had good reason to regard them as the staunchest advocates of the employees' collective interests and among the principal architects of the Union's organizational campaign. Given the timing of their discharges, only hours after they were observed distributing union materials by most of the Company's officials, an extremely compelling case is presented that Respondent terminated them for discriminatory reasons proscribed by the Act.

The rationalizations offered by Respondent in defense of its conduct are unconvincing. Respondent claims that the discharges were motivated by Mercado's and Rivera's misconduct in violating the Company's no-distribution rule. However, Edd Ahrens conceded at the hearing that he had no knowledge that Mercado and Rivera literally walked the petition from one employee to another on company time. Indeed, if they had wandered throughout the plant, they surely would have been observed by Ruiz or one of his assistants. Rather, Ahrens only harbored a belief that the two initiated the petition. The company rule does not prescribe penalties for those who merely originate petitions. Holding Mercado and Rivera accountable for this reason would, in itself, constitute an unfair labor practice. Moreover, if Respondent were concerned about the purported interruption of production, as it claimed, then all those who signed the petition were equally culpable. Yet, only Mercado and Rivera were singled out for discipline.

Further, the rule to which Respondent adverts makes the first breach punishable by a warning. Since neither Mercado nor Rivera had been involved with an alleged violation of the no-solicitation rule prior to May 12, and if this were, as Respondent contends, the reason for disciplining them, then they deserved nothing more than a warning. Respondent's failure to abide by the terms of its own rule by discharging employees for a first offense reveals that its invocation of the rule was a sham used to mask its true motives which were vindictive and discriminatory.

In an effort to divorce discharges which took place at noon on May 21 from the employees' organizational activities earlier that day, Edd Ahrens and Ruiz testified that the discharge decisions were made on either May 19 or 20. Their testimony is unbelievable. If the decision

were made in advance, then Ruiz would have no reason to warn Mercado and Rivera conditionally that they *could* be fired for flouting company rules on the morning of May 21.

Other reasons for the discharges which were listed in Mercado's and Rivera's termination notices and placed in their personnel files were equally spurious. The notice which Ruiz prepared regarding Mercado's dismissal refers to three incidents which occurred in 1979. It is curious that Mercado's argumentative manner and inability to get along with others, as alleged in memos summarizing these incidents, surfaced as a cause for dismissal only when he became a union advocate. Ruiz reference to an incident allegedly involving a complaint made by Peterson about Rivera was exposed by Peterson's testimony as an offensive distortion of the truth. If Mercado and Rivera were as uncooperative in manner as Respondent suggests, it is difficult to explain why their fellow workers chose them as their representatives.

Respondent's attempt to build a case against these employees by resort to a rule which did not fit the deed, by resurrecting events long since past and by fabricating conduct, produces the reverse effect from the one intended for it raises the inference that the cited reasons for the discharges were not the real reasons. Rather, where, as here, the evidence shows that Respondent was strongly opposed to any collective activity among its employees and repeatedly threatened them with discharge if they persisted in such activity, the real reason for the dismissals of Mercado and Rivera was to purge the plant of its most active union proponents.

C. *A Bargaining Order Is Appropriate*

There is no dispute as to the authenticity of the employees' signatures on 113 authorization cards, including the cards of 19 employees who, as I found above, are not supervisors. Further, it is agreed that Respondent's work force numbered approximately 118 employees in the relevant time period immediately preceding May 21, the date on which the Union attained a majority. Thus, the record shows that the Union had more than majority support prior to the start of the workday on May 21, 1980.

Respondent contends that the General Counsel failed to prove that the unit described in the complaint is appropriate.[20] I find little merit in this contention.

"It is well established that a unit of production and maintenance employees is presumptively appropriate in the absence of cogent reasons to the contrary." *Ultra-Sonic De-Burring, supra* at 1067, quoting from *Rembrandt Lamp Corporation*, 128 NLRB 905, 906 (1960). Moreover, the Board frequently has asserted the validity of a single plant unit. *Id.*

Other earmarks of an appropriate unit are also evident here. The employees shared a community of interests in that they all were subject to the same terms and conditions of employment, worked under the same supervisory structure, were under the same centralized management, and were engaged in a unified enterprise—the production of a prototype aircraft. Thus, they were bonded by having a common technology and somewhat integrated tasks requiring related skills.

Moreover, although the extent to which the employees have organized may not be a controlling consideration in unit determinations under Section 9(c)(5) of the Act, some weight may be accorded to their expressed desires. See *N.L.R.B.* v. *Morganton Full Fashioned Hosiery Co. and Huffman Full Fashioned Hosiery Mills, Inc.*, 241 F.2d 913 (4th Cir. 1957). Here, all but five of Respondent's production force registered their interest in having the Union represent them.

Since Respondent has adduced no cogent reasons which would refute the presumption attached to a production and maintenance unit at its plant, I find that unit appropriate.

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Supreme Court affirmed the Board's authority to issue bargaining orders not only in exceptional cases marked by outrageous and pervasive unfair labor practices, but also in less extraordinary cases where there are fewer "pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." In determining whether a bargaining order is appropriate in the second category of cases, it is necessary to consider whether the effects of the past unfair labor practices can be erased by the use of traditional remedies and whether there is a likelihood of their reoccurrence. *Id.* at 614–615 (1969).

Applying these principles to the present case, I conclude, in agreement with the General Counsel, that "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . ." *Id.* at 615.

Respondent argues that, if it committed any unfair labor practices, they were so insignificant as to have no deleterious effect on the election process. It further argues that, since any misconduct occurred the most part prior to the date the Union attained a majority, it could have no dissipating effect on that majority.

The Union was assured of majority support by the start of the workday on May 21. The discharges of Mercado and Rivera came several hours later and thus were a part of Respondent's swift response to the Union's organizational campaign.

The discharge of principal union activists is misconduct which the Board and the courts have long regarded as so serious and coercive as to justify a finding without extensive explication that they are likely to have a lasting inhibitive effect on a substantial percentage of the work force. See *N.L.R.B.* v. *Jamaica Towing Co.*, 632 F.2d 208 (2d Cir. 1980); *Faith Garment Company, Division of Dunhall Pharmaceutical, Inc.*, 246 NLRB 299 (1979), affd. 630 F.2d 630 (8th Cir. 1980).

The coercive impact of the discharges in this case was augmented by virtue of their timing, coming only several hours after the men had been threatened with discharge for distributing union authorization cards in the presence of a large number of other employees. Moreover, because they were the chosen leaders of the work force,

[20] The unit sought is for all production and maintenance employees of Respondent employed at its plant, exclusive of all other employees, office clerical employees, guards and supervisors as defined in Sec. 2(11) of the Act.

their dismissals had to receive widespread attention. The lesson which Respondent meant to convey to the balance of the work force could not have been lost—the price of active support for the Union was punishment, immediate and severe. It was a lesson not easily forgotten. If Respondent's antipathy to union activity was so intense that it was willing to sacrifice two of its most experienced and highly trained employees, then certainly, less skilled workers would have even more reason to fear a similar fate if they too continued to support the Union. Thus, the unlawful termination of two key union proponents was calculated to quell the employees' prounion sympathies and thereby thwart the Union's drive.

In addition to these discharges, Respondent engaged in a series of other unfair labor practices which are likely to have a lasting effect in the memories of the workers. Thus, Respondent threatened Juan Mendez, Rey Mendez, Luis Nunez, and Linda Santiago with discharge if they became involved in union activities. That such threats may have been made a day or two before the Union attained its majority does not diminish their chilling effect where, as here, the employees could observe that Respondent was willing to convert similar threats into action by discharging Mercado and Rivera. Moreover, the Board has posited that the commission of unfair labor practices before the union's attainment of a majority will not immunize an employer from the issuance of a bargaining order since, by its own actions, the employer has made it uncertain whether the employees can freely elect a bargaining representative. *Merritt Motor Company*, 181 NLRB 1099, 1106 (1970); *Brookland, Inc.*, 221 NLRB 35, 40 (1975).

Further, as found above, on May 21 Respondent threatened plant closure if employees imposed too many demands on the Company. It is difficult to conceive of a threat more calculated than this to undermine employees' support for a union and by itself is sufficient to vitiate a fair and free election. *Ultra-Sonic De-Burring, supra* at 1068.

On May 25, Respondent persisted in its unlawful behavior by creating the impression it was surveying the activities of Peter Lugo, by interrogating him about his and other employees' interest in the Union, and by issuing a warning to him supposedly for violating the Company's no-distribution rule but, in fact, because he was engaging in union activity. Just a week before the hearing was held in this case, Respondent again improperly interrogated an employee.

I do not believe that a make-whole remedy and order would suffice to erase from the employees' memories the indelible imprint of Mercado's and Rivera's discharges. Reinstatement and backpay, offered months and possibly years after discriminatory discharges, cannot eradicate the harm that has been done. See *N.L.R.B.* v. *Jamaica Towing Co., supra.*

Nor is it likely that a cease-and-desist order posted under Board and perhaps judicial compulsion would root out the coercive effects on employees of Respondent's threats to discharge them or close the plant if they persisted in their union activities. I also am doubtful that such an order would deter Respondent from continuing its unfair labor practices when they were committed not by low-level officers but by four of Respondent's chief officials and where Respondent has not taken even the simple curative step of rescinding its overly broad no-distribution rule. See *Justak Brothers and Company, Inc.*, 253 NLRB 1054 (1980).

The cases cited in Respondent's brief to support the argument that its conduct falls into the third category of *Gissel*-type cases where no bargaining order is warranted are factually distinguishable from those in the present case. Thus, in *White Pine, Inc.*, 213 NLRB 566 (1974), the union actually won a Board election. *Walgreen Company*, 221 NLRB 1096 (1975), involved interrogation by a low-level supervisor, a single unlawful reprimand based on an overly broad application of an otherwise valid no-solicitation rule, and an unlawful wage increase which was not specifically related to the employer's antiunion campaign. A bargaining order was denied in *Struthers-Dunn, Inc.* v. *N.L.R.B.*, 574 F.2d 796 (3d Cir. 1978), where a sufficient number of employees withdrew their union authorization cards thereby dissipating the union's majority before the employer's unfair labor practices began. The fourth case relied on by Respondent, *Pulley* v. *N.L.R.B.*, 395 F.2d 870 (1968), turned on a question of the employer's good faith, which under the Supreme Court's *Gissel* decision is no longer a relevant consideration, and involved unfair labor practices committed entirely before the union requested recognition. Accordingly, the cases cited by Respondent have no bearing on the facts in the instant case and, therefore, do not derogate from my conclusion that the cumulative effects of Respondent's unfair labor practices are so pervasive and severe as to undermine any expectation that a fair election could be held.

Respondent argues that a remedial order is unwarranted in this case and urges that the complaint should be dismissed in its entirety because, for legitimate economic reasons, operations at its plant have been at a standstill since the end of May 1980.

There is no dispute that a delay in receiving further financial assistance from the Government and other investment sources compelled Respondent to lay off 80 percent of its work force in June 1980 and, to date, it continues to function with only a skeletal staff. However, Respondent stressed in its pleadings that it is making ardent efforts to obtain a Federal loan and that its negotiations looked promising. Further, Respondent indicated that FAA approval of its aircraft was imminent and that, with this approval, final sales of planes on order could be culminated. Moreover, Respondent stated that it would fully reactivate its Aguadilla plant as soon as economically feasible and would then recall its former employees. Indeed, given the Company's need for skilled employees, it would be costly not to rehire them. Thus, although it appears at this juncture that Respondent is not in a position to predict precisely when the anticipated funding will materalize or when its doors will reopen, it also would be premature to suggest that it has shut down permanently so as to make a bargaining order futile.

In cases such as this, where the union has not made a bargaining demand, the Board has tied the effective date of the bargaining order to the date on which the employ-

er initiated its campaign of unfair labor practices if, as of that date, the union obtained majority support. *Rodeway Inn of Las Vegas*, 252 NLRB 344 (1980); see also *Boatel Alaska, Inc.*, 236 NLRB 1458 (1978); *Ultra Sonic De-Burring, Inc., supra* at 165. Although some of the unfair labor practices which make a bargaining order appropriate here occurred prior to the date the Union attained its majority, in accordance with the Board's approach, I conclude that the bargaining order should be retroactive to May 21, 1980.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. At all material times, Ariel Berrios, Adalberto Cuadrado, Hiram Enchautegui, Julio Lopez, Manuel Lopez, Melvin Martinez, Juan Mendez, Eduardo Mercado, George Montalvo, Abraham Mora, Nicolas Ramirez, Wilfredo Ramos, Freddy Rivera, Luis Rivera, Neftali Rodriguez, Ivan Salas, Alfredo Sosa, and Jose Valentino were employees within the meaning of the Act.
4. Commencing on May 21, 1980, and continuing thereafter, the Union was designated by a majority of Respondent's employees in the unit described above as their exclusive bargaining representative.
5. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by threatening employees with plant closure; by maintaining and applying an overly broad no-distribution rule; by threatening employees with discharge if they joined a union; by instructing employees they could not join a union; by creating the impression they were engaged in surveillance of an employee's union activity; by interrogating that employee about his and other employees' interest in the union and disciplining him because of his participation in union activity; and by interrogating an employee without proper assurances that his participation was voluntary and no reprisals would be imposed.
6. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act:

> All production and maintenance employees of Respondent employed at its plant, exclusive of all other employees, office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

7. Respondent has violated Section 8(a)(3) and (1) of the Act by discharging employees Eduardo Mercado and Freddy Rivera on May 21, 1980.
8. The Union has been at all times since May 21, 1980, and still is, the exclusive bargaining representative of such employees within the meaning of Section 9(a) of the Act.
9. By its violations of Section 8(a)(1) and (3) of the Act, as reviewed above, Respondent has prevented a free and fair election. Therefore, to best serve the purposes of the Act, Respondent is required to recognize and bargain with the Union as of May 21, 1980, the date by which a majority of employees has signed authorization cards designating the Union as its exclusive bargaining agent, concerning the rates of pay, wages, hours, and working conditions of unit employees.
10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom. Because Respondent has committed a number of serious and pervasive violations of the Act through its vice president and other top-level supervisors, I conclude that, unless restrained, Respondent is likely to engage in continuing unlawful efforts in the future to prevent its employees from engaging in union and protected concerted activity. Accordingly, Respondent will be required to refrain from in any other manner infringing on employees' rights to engage in such activity. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Respondent has stated its intention to resume operations when and if it obtains sufficient funding. Therefore, when Respondent does resume such operations,[21] it will be required to offer Eduardo Mercado and Freddy Rivera reinstatement to the jobs of which they were unlawfully deprived or, if such jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges previously enjoyed. *Franklin Fouts, d/b/a B & F Cartage*, 251 NLRB 645 (1980). Further, Respondent will be ordered to make Rivera and Mercado whole forthwith for any loss of pay they may have suffered by reason of the discrimination against them, less net earnings, from the date of their discharges, May 21, 1980, to such date as Respondent demonstrates during the compliance stage of this proceeding that they might have been laid off in the normal course of its business, less net earnings, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as called for in *Florida Steel Corporation*, 231 NLRB 651 (1977). In addition, Respondent will be required to bargain with the Union on request, such bargaining to be retroactive to May 21, 1981, the date on which the Union attained a majority among Respondent's employees. *Rodeway Inn of Las Vegas*, 252 NLRB 344 (1980); *Beasley Energy, Inc. d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977).

Although most of the employees who testified at the hearing in this case were fluent in English, Spanish is nonetheless the native language of many Ahrens' employees. Therefore, Respondent will be required to mail to all those employees, including Rivera and Mercado, who were employed as of May 21, 1980, copies of the notice attached hereto in Spanish as well as English. Respondent also shall post said notice in appropriate places at its plant.

[21] Respondent shall offer reinstatement to Mercado and Rivera as soon as appropriate positions become available whether or not there has been a full-scale resumption of its operations.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[22]

The Respondent, Ahrens Aircraft, Inc., Aquadilla, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge or plant closure in order to dissuade them from supporting a union or otherwise engaging in protected concerted activities.

(b) Discharging, warning, or otherwise discriminating against employees with regard to any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in any activity protected by Section 7 of the Act.

(c) Creating the impression of surveillance of employees' union activities, interrogating employees regarding their union activities, or instructing employees that they are ineligible to join a union.

(d) Interrogating employees without advising them that their responses are voluntary and that they will suffer no reprisals.

(e) Maintaining and applying an overly braod rule which unlawfully prohibits the distribution by employees of unauthorized materials on company property during nonworking hours.

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) As soon as Respondent resumes its aircraft assembly operations or has appropriate jobs, whichever comes first, offer Eduardo Mercado and Frederick Rivera reinstatement to the jobs of which they were unlawfully deprived or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole forthwith for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in that part of this Decision entitled "The Remedy."

(b) Upon request, recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit and embody in a signed agreement any agreement reached.

(c) Post at its Aguadilla, Puerto Rico, plant copies of the attached notice marked "Appendix."[23] Copies of said notice in English and Spanish, on forms provided by the Regional Director for Region 24, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material. Copies of the attached notice in English and Spanish also shall be mailed to the home address of all employees, including Eduardo Mercado and Freddy Rivera, who were employed by Respondent as of May 21, 1980.

(d) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[22] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become it findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."